81-2200

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE MINERS AND MERCHANTS BANK
OF ROUNDUP, MONTANA,

Petitioner,

vs.

L. D. STENSVAD, personally and as representative of the investing shareholders of AGRI-SERVICES, INC., M-V ENTERPRISES, INC., M&S CATTLE FEEDERS, and L. D. STENSVAD CATTLE CO., all Montana corporations,

Respondent.

ON WRIT OF CERTIORARI FROM
THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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1. QUESTION PRESENTED

Whether the decision of the Supreme Court of the State of Montana constitutes a deprivation of Petitioner's property without due process of law, contrary to the 5th and 14th Amendments to the US Constitution when it held that:

1. Interest on promissory notes owed Petitioner under its counterclaim was available to Petitioner as a matter of law, but refused to so grant or award that interest where the amount of such interest was a stipulated fact;

2. Respondent Stensvad was entitled to the value of certain real property as damages for conversion of real property, without reference to and in spite of Petitioner's prominent and properly-raised claim that no jurisdiction, including Montana, provides for the conversion of real estate or damages therefore.

3. Respondent Stensvad was entitled

to damages for the value of certain real and personal property, without reference to and in spite of Petitioner's prominent and properly-raised claim that such a holding was contrary to a previous ruling of the same trial court involving the same parties and property and therefore was barred under the doctrine of res judicata?

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4. OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana is reported at 640 P.2d 1303, printed in Appendix hereto, infra, page 86.

A related case appears at: Stensvad v. Miners and Merchants Bank, 598 P.2d 1083.

5. JURISDICTION

The opinion of the Supreme Court of the State of Montana (Appendix, infra, page 86) sought to be reviewed was entered on January 7, 1982. A timely Petition for Rehearing was denied on February 25, 1982. (Appendix, infra, page 187). The jurisdiction of the Court is invoked under the Judicial Code, 28 United States Code, Section 1257(3).

6. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The case involves the two following

Amendments to the United States Constitution:

Amendment 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment 14(1)

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

7. STATEMENT OF THE CASE

A. Facts Material to Federal Question Presented.

The case involves a banking relationship between the Petitioner Bank and L. D. Stensvad, who operated a feedlot operation through four corporations.

As of November 11, 1971, certain Promissory Notes secured by real and personal property, were due, owing, and unpaid from the four corporations to the Bank in the amount of $1,022,325.73. (Appendix, infra, Requests for Admissions, No. II (16) at page 29, deemed admitted by court order.)

On November 16, 1971, Otto Stensvad served a Complaint in a related case (Stensvad v. Miners & Merchants Bank, 598 P.2d 1083) seeking exoneration from certain guarantees he personally made to the Bank in connection with loans made to . .e various corporations.

The Bank, thereafter, embarked on a course of foreclosure and repossession and sale of the assets, real and personal, of the four corporations.

With respect to all real estate of the four corporations, the Bank proceeded by way of a foreclosure action separate from the instant case, but involving the same parties and property, resulting in a judgment and decree in the Bank's favor. (Montana Nat'l. Bank of Roundup vs. M-V Enterprises, Inc., No. 7072, Decree and Judgment, Appendix, infra, page 1).

Notice of the taking of possession of the feedlot and the entire operation had been sent by the Bank and received by L.D. Stensvad on November 19, 1971. (Appendix, infra, Requests I (23), pages 24 & 25. The Bank in a separate action from the instant case, but involving the same parties and property, filed a claim and delivery action for recovery of personalty covered by security agreements, and in that action, obtained a court-authorized sale (Appendix, infra, page 14) and a subsequent judgment (Appendix, infra, page 16). At no point in the process of the

Bank's repossession, sale and foreclosure did the Bank proceed other than in a lawful manner and at all points where required, the Bank proceeded via the court actions separate from the instant case.

The instant case was brought by Stensvad in the same court of original jurisdiction claiming the Petitioner Bank breached an oral contract to loan more money - sufficient money to allow the feedlot operation to succeed. The Trial Court found such a contract and found a breach of the contract took place on October 7, 1971. The Trial Court, and later the Supreme Court, ignored Petitioner Bank's contention that no breach existed because the loans were well over Stensvad's self-imposed limit, that numerous indications of insolvency constituted a change of circumstances, and that subsequent loans of $218,000 constituted a waiver and subsequent accommodation.

The Trial Court awarded Stensvad the sum

of $2,142,742 on his claim based primarily on conversion of the property that was taken by the Bank by legal foreclosure. It awarded the Bank the sum of $1,868,138 on its Counterclaim based on the unpaid promissory notes. This resulted in a net judgment to Stensvad of $274,604 after offset for the Bank's Counterclaim. (Appendix, infra, Findings, page 45; Findings, page 49; Nunc Pro Tunc Order, pages 84-85). Of the amount awarded Stensvad, $814,936 was for the conversion of real estate, namely, the feedlot and elevators. Of the amount awarded the Bank, $845,813 was for interest on the Promissory Notes. The trial court ignored the Judgments and Orders in the foreclosure cases brought by the Bank in the same trial court and computed all interest from an arbitrary date, namely, November 11, 1971, instead of taking the amount of the Judgments from the date of those Judgments.

The Montana Supreme Court reduced the

amount of damages awarded Stensvad to $1,206,046 and reduced the amount of damages awarded the Bank to $1,022,325, for a net judgment of $183,721 to Stensvad.

The Montana Supreme Court and court of original jurisdiction thus acted as follows:

Stensvad Claim	Trial Court	Supreme Court
1. Conversion of personal property	$354,111	$354,111
2. Conversion of cattle a. conversion of cattle, $277,102 b. profit by bank on sale of cattle, $104,898	$382,000	$382,000
3. Conversion of feedlot and elevators	$814,936	$411,935
4. Mishandling of business	$ 80,000	$ 58,000
5. Lost profits	$511,695	0
	$2,142,742	$1,206,046

Bank Counterclaim	Trial Court	Supreme Court
1. Principa	$1,022,325	$1,022,325
2. Interest	845,813	0
	$1,868,138	$1,022,325
Net to Stensvad	274,604	183,721

(Appendix, infra, Supreme Court Opinion, page 102).

As to the interest disallowed by the Montana Supreme Court, the court in its opinion impliedly stated that interest would be allowable to the Bank from the date of taking of the property by the Bank until the date of application of proceeds from sale, but without explanation denied the same:

> "In view of the fact that the Stensvad property taken by the bank and sold as collateral for the indebtedness due it, exceeded in value as we have above shown the amount of the principal indebtedness, it is improper in this case to award interest to the bank on the note balances to the date of Judgment. Once the value of the collateral had been applied to the principal indebtedness through means of foreclosure and other sales, Stensvad's obligation for further interest on those notes to the extent of collection was obviously terminated. The bank is entitled to a set-off of no more than the amount of the principal indebtedness as of the date of the breach

found by the District Court." (Emphasis Supplied).

Opinion, Appendix, infra, page 130.

The Montana Supreme Court, in denying Petitioner's Request for Rehearing (Appendix, infra, page 187), reaffirmed that interest was due from date of breach to application of moneys after foreclosure but indicated that such sums were not computable from the record:

> "1. Petitioner bank contended it is entitled to a set-off for interest accrued on the principal indebtedness on the notes from the date of breach until the monies received on foreclosures by the bank were applied on the notes. We so indicated in our opinion. However, we carefully searched the record to determine the applicable amounts and dates, and were unable to identify either in any case. This court is bound by the record before us. Therefore, we held that the set-off would be the amount of principal indebtedness as of the date of the breach on facts found by the District Court."

Thereafter, Petitioner filed its "Petition for Supervision or Correction of Remittur" (sic.) (Appendix, infra, page 190) setting out its contention which was advanced

at every stage of the appeal and never contested up to this point by Respondent Stensvad, namely, that the amount of interest from the date of taking of the properties to the date of sale was proposed as a stipulation by counsel for Stensvad and so stipulated to by the Bank's counsel to be $35,962.93 after all off-sets:

January 22, 1979
2:30 P.M.

> THE COURT: All right, you may proceed. How do you want to do this, do you want to put your stipulations into the record first?
>
> MR. TOLLIVER [Counsel for Respondent Stensvad]: I guess, your honor. Let the record show that the plaintiff [Stensvad] offers to stipulate that the balance of the loans between the plaintiffs and the defendants on or about November 18, 1971, was the amount of $1,010,216.80.
>
> Do you want to stipulate to that?
>
> MR. TOWE [Counsel for Petitioner Bank]: We will so stipulate.
>
> MR. TOLLIVER: Let the record further show that the balance remaining on such promissory notes without regard to accrued interest on or about June 10, 1972, was the amount of $374,807.35, and that in arriving at that balance credit

was given against the loans from the sale of all of the personal property assets of the plaintiffs from the sale of the feedlot and elevator at Roundup and that prior to these credits being given the bank charged against the obligation of the plaintiffs expenses which the bank incurred while operating the feedlot to feed out the cattle prior to sale, and expenses incurred in conducting the sale of certain items of personal property on June 10, 1972.

Let the record further reflect that had interest been accrued in these obligations, the interest to June 10, 1972, would be $35,962.93 accrued interest.

Do you desire to stipulate to that?

MR. TOWE: Your Honor, we will stipulate as far as that goes. Are you going to stipulate as to the amounts of the proceeds actually applied against the loans?

MR. TOLLIVER: Yes.

MR. TOWE: You are coming to that. Okay. We will stipulate as to what has been said so far.

MR. TOLLIVER: Let the record further reflect, Your Honor, that in liquidating the assets of the plaintiffs, the bank received from sale of fat cattle and Mexican roping steers the sum of $520,000.00, and that from the sale of equipment and rolling stock at auction, the sum of $66,064.70; that prior to such sale the bank received from leases of elevator facilities the sum of $912.60, and that the bank bid at the sale for the feed lot and elevator at

Roundup the sum of $200,000.00.

Let me add to that that in addition certain items of other personal property were sold, which will be subject to later stipulation. I will offer to stipulate to the foregoing.

MR. TOWE: And that those sums all were applied against those loans to arrive at the $374,000 figure.

MR. TOLLIVER: Yes, the foregoing sums were assigned.

(At this time there was discussion off the record).

MR. TOLLIVER: Stipulated. Let the record further reflect that the records of the bank indicate that the bank earned a net profit by operating the feed lot from November, 1971, until the date that such operation ceased in the spring of 1972, from feeding cattle, in an amount of $104,899.73, which amount represents an increase in the total proceeds received by the bank over the proceeds that would have been received had the cattle been sold in November of 1971, after payment of all expenses.

MR. TOWE: And that that amount was applied to the debts.

MR. TOLLIVER: And that such proceeds were applied to the debts.

MR. TOWE: I will stipulate to that."

January 22, 1979, Supplemental Hearing before the court of original jurisdiction.

As noted above, the starting date for the above stipulation used the agreed-upon loan balance of November 18, 1971. And, as previously indicated herein, supra, page , the notice of the taking of possession of the feedlot and the entire operation was received by Stensvad on November 19, 1971.

In its "Order Denying Petition" (Appendix, infra, page 187), the Montana Supreme Court rejected Petitioner's claim by reiterating its contention that it could not substantiate Petitioner's contention (that the amount of interest was stipulated to) in the record. (By this time, Stensvad, for the first time, attempted to repudiate his stipulation in his answer to Petitioner's Petition for Supervision or Correction of Remittur (sic.). (Appendix, infra, page 198).)

B. Raising of Federal Question.

(1) Interest Issue.

Petitioner was awarded $845,813 in interest due on promissory notes on its counter-

claim by the court of original jurisdiction. (Findings and Conclusions, Counterclaim, March 24, 1980, Appendix herein, infra, page 45).

On cross-appeal to the Montana Supreme Court, Respondent Stensvad raised issue with the award of interest, there being no issue on appeal as to the award of the principal amount on the counterclaim.

In its opinion on the case, the Montana Supreme Court held that the Petitioner was entitled only to interest on the promissory notes from the date of the breach of an agreement to loan additional funds up to application of proceeds from sale of collateral and not up to date of judgment, but then without reasons or discussion reduced the award of $845,813 to $0. (Opinion, January 7, 1982, Appendix herein, infra, page 130).

In a timely Petition for Rehearing, Petitioner argued that Petitioner should be awarded interest from the date of breach to

the date of application of proceeds of sale because the court had said Petitioner was so entitled in its opinion. (Petition for Rehearing, Appendix herein, infra, page 136).

In denying Petitioner's request for rehearing, the Montana Supreme Court reaffirmed that interest was due from date of breach to application of moneys from sale of collateral, and for the first time indicated that the basis for the opinion was the court's conclusion that such sums were not computable from the record. (Order Denying Petition for Rehearing, Appendix herein, infra, page 187).

At or prior to that time, neither the Montana Supreme Court on its own initiative nor Respondent Stensvad had suggested or argued that the question of the determination of the amount of interest for the time period was even at issue. During oral argument and in briefs submitted, Petitioner had advanced the unquestioned point that a stipu-

lation of counsel, offered by Reponsdent Stensvad and accepted by Petitioner, existed of record, as to the amount in question, namely, $35,962.93.

After the Supreme Court of Montana's denial of the timely request for rehearing, no mechanism for further review under Montana law or court rule existed.

Petitioner thus raised for the first time in this Petition for Certiorari the federal question as to interest. Consequently, at no point did the Montana Supreme Court make reference to the federal question on interest.

(2) Res Judicata and Conversion of the Real Estate.

Respondent Stensvad was awarded by the District Court and the Montana Supreme Court, on his claim, the sum of $814,936 for the conversion of real estate. The question of conversion of real estate as not being recognized in law was regularly raised by Petitioner at all stages, never contested by

Respondent Stensvad, and never acknowledged by the Montana Supreme Court.

Respondent Stensvad was also awarded $354,111 for conversion of personal property and $277,102 for conversion of cattle, or a total of $631,213. This amount plus the $814,936, or a total of $1,446,149 was regularly and prominently raised by Petitioner as being not due because of the doctrine of res judicata, at all stages, was never contested by Respondent Stensvad, and was never acknowledged by the Montana Supreme Court.

The Opinion of the Supreme Court of the State of Montana was entered January 7, 1982, (Appendix, infra. page 86).

On January 15, 1982, Petitioner timely filed a "Petition for Rehearing" (Appendix, infra, page 136), in the Montana Supreme Court.

On January 18, 1982, Respondent filed a "Cross Petition and Response to Petition

for Rehearing" (Appendix, infra, page 162), in the Montana Supreme Court.

On January 27, 1982, Petitioner filed a "Response to Cross-Petition" (Appendix, infra, page 176), in the Montana Supreme Court. Therein, Petitioner raised for the first time the federal question presented as to the issues of res judicata and conversion of real estate:

> "Therefore, the District Court awarded damages for conversion, which this court has sanctioned, contrary to the principal of law that conversion of realty does not exist. Such a taking is a deprivation of property without due process of law under the Montana and U.S. Constitution."
>
> (Appendix, infra, page 178).

> "Therefore, Stensvad still fails to show why res judicata does not apply. Such a taking is a deprivation of property without due process of law under the Montana and U.S. Constitution."
>
> (Appendix, infra, page 179).

The Montana Supreme Court did not make reference to the federal question raised in its "Order Denying Petition for Rehearing" (Appendix, infra, page 187).

On March 10, 1982, Petitioner filed a "Petition for Supervision or Correction of Remittur" (sic.) (Appendix, infra, page 190) with the Montana Supreme Court. In its "Order Denying Petition" entered March 25, 1982, the Montana Supreme Court did not refer to the federal question raised.

8. REASONS FOR GRANTING THIS WRIT

A.

THE RESULTS OF THE MONTANA SUPREME COURT ACTION DENY PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

(1) BY RULING THAT PETITIONER WAS ENTITLED TO INTEREST ON ITS PROMISSORY NOTES TO DATE OF SALE, PETITIONER'S RIGHTS BECAME FIXED. TO THEN DENY THIS INTEREST IN SPITE OF UNCONTROVERTED STIPULATED FACTS DENIED PETITIONER A REAL OPPORTUNITY

TO PROTECT ITS PROPERTY.

The effect of the Montana Supreme Court's ruling in this case constitutes more than the exercise of legitimate judicial discretion. In effect, it states to Petitioner that "You are entitled to interest, but we can't find in the record where you proved the amount of interest you are entitled to". Order Denying Petition for Rehearing, Appendix herein, infra, page 187. In fact, the amount of interest, $35,962.93, was stipulated by the parties (see page 11 , supra), and all parties recognized the validity of that stipulation until the Montana Supreme Court's Order Denying Petition for Rehearing (after which, Stensvad, for the first time and clearly acting in his own self-interest, denied the stipulation).

Admittedly, the Fourteenth Amendment is not a guarantee that a trial shall be devoid of error. Nor does it assure uniformity of judicial decision, but when the mis-

carriage is of such gravity and magnitude that it cannot be expected to happen in an enlightened system of justice, this court should intervene. Stein v. New York, 346 U.S. 156, 97 L. Ed. 1522 (1953). To deny facts which have been stipulated to by the opposing parties and which have been acknowledged without contradiction by all parties for over 10 years of litigation in the final order denying rehearing before the State Supreme Court is just such a miscarriage of justice. It cannot be tolerated.

As stated by Justice Brandeis:

> ... "the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court." Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 74 L. Ed. 1107, 1113 (1939).

Nevertheless, Justice Brandeis made it quite clear that the result of a Supreme Court decision may well be a violation of the Due

Process Clause of the Fourteenth Amendment.

> "If the result above stated were attained by an exercise of the state's legislative power, the transgression of the Due Process Clause of the Fourteenth Amendment would be obvious. ... The violation is nonetheless clear when the result is accomplished by the state judiciary in the course of construing an otherwise valid ... state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislatrive, executive, or administrative, branch of government." Ibid.

As stated by Justice Oliver Wendell Holmes speaking for This Court:

> "Whenever a wrong judgment is entered against a defendant his property is taken when it should not have been ... ." Chicago Life Insurance Co. v. Cherry, 244 U.S. 25, 61 L. Ed. 966, 969 (1917).

Justice Holmes continues to state that a mistake which is not so gross as to be impossible of rational administration of justice is no more than the imperfection of man. The clear implication is that when a mistake is so gross as to make the rational administration of justice impossible, it is a denial of constitutional rights and in particular a denial of due process of law. Ibid.

Justice Cardozo, speaking for This Court, speaks of a denial of due process when "plain rights" have been ignored.

> "To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action." Roberts v. New York, 295 U.S. 264, 79 L. Ed. 1429, 1435 (1935).

In Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra, the Plaintiff Savings Company challenged the inequity in tax assessment against its shares as opposed to the assessment against other similar property. The Missouri Supreme Court denied relief claiming the Plaintiff should have exhausted administrative remedies by seeking to have its claim heard by the State Tax Commission before seeking relief in court. Previous decisions of the Missouri Supreme Court, however, made it quite clear that the State Tax Commission had no power to review such a complaint, and it was assumed by all parties and everyone involved right up until the decision of the Missouri Supreme Court

in the Brinkerhoff case that no administrative remedies existed. Further, by this time it was too late for Plaintiff to seek such relief in the State Tax Commission because of the time lapse.

Justice Brandeis, writing for This Court, stated:

> "If the judgment is permitted to stand, deprivation of Plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the Plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the Plaintiff did not first seek an administrative remedy which, in fact, was never available, and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the Plaintiff of its property.
>
> ...
>
> Our present concern is solely with the question whether the Plaintiff has been accorded due process in the primary sense, - whether it has had an opportunity to present its case and be heard in its support. ... [B]ut, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing,

> accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." 74 L. E. 1112-1114.

This Court held, therefore, that the Plaintiff had been denied due process of law, and the case was reversed and remanded for further proceedings.

Similarly, in the instant case, the Petitioner Bank has not been afforded any real opportunity to protect its right to the interest that the Supreme Court has now said it was entitled to receive. Just as the Supreme Court in the Brinkerhoff case changed the rules of the game after it was too late for the Plaintiff to use the new rules to protect its property, the Montana Supreme Court in the instant case changed the rules of the game after it was too late for the Petitioner Bank to follow the fules to protect its property rights. After all parties

and all persons concerned with the case had, during over ten years of litigation, accepted a stipulation of facts (actually read into the record by opposing counsel) as establishing the amount of interest to date of sale, the Supreme Court states, for the first time in response to Petitioner's Petition for Rehearing, that such facts were not established in the record and therefore denied Petitioner's requested relief.

Just as in Brinkerhoff where the Supreme Court's reversal of position came too late for the Plaintiff to seek the newly approved relief, thereby effectively prohibiting Plaintiff from an opportunity to be heard on its claim, the Montana Supreme Court in the instant case rejected a stipulation and assumed facts too late in the litigation to enable Petitioner Bank an opportunity to be heard on the truth and validity of those facts. (Although Petitioner Bank frantically attempted to point out this inconsistency

to the Montana Supreme Court in a Petition for Correction of Remittitur, relief was again summarily denied after counsel for Stensvad - the very same person who read the stipulation into the record - responded by denying the stipulation. Denying the truth of a stipulation after petition for rehearing has been denied in a State Supreme Court clearly comes too late to afford the injured party an opportunity to prove its stipulated facts.) Just as the Plaintiff in the Brinkerhoff case was denied a real opportunity to protect its property, so was the Petitioner Bank in the instant case denied a real opportunity to protect its property, namely, its right to receive interest to the date of sale as the Montana Supreme Court indicated it was entitled to receive.

Certainly, as stated by This Court in Stein v. New York, supra, the instant case presents a miscarriage of such gravity and magnitude that it cannot be expected to happen

in an enlightened system of justice. 97 L. Ed. at 1541. Or, as stated by This Court in Roberts v. New York City, supra, the plain rights of Petitioner Bank have been ignored; the error was so gross and obvious as to come close to the boundary of arbitrary action. 79 L. Ed. at 1435. Paraphrasing Justice Holmes, the wrong done to Petitioner Bank in the instant case constitutes a mistake so gross as to be impossible in a rational administration of justice. Chicago Life Insurance Co. v. Cherry, supra, 61 L. Ed. at 969. See also American Railway Exp. Co. v. Kentucky, 273 U.S. 269, 71 L. Ed. 638, 47 S. Ct. 353 (1925) (clear conflict with those fundamental principles which have been established for the protection and enforcement of private rights); Corrigan v. Buckley, 271 U.S. 323, 70 L. Ed. 969, 46 S. Ct. 521 (1926); Wolff v. McDonnell, 418 U.S. 539, 41 L. Ed. 2d 935, 952, 94 S. Ct. 2963 (1974) (the touchstone of due process

is protection of the individual against arbitrary action of government).

(2) BY AWARDING DAMAGES FOR CONVERSION OF REAL PROPERTY CONTRARY TO THE WELL-ESTABLISHED PRINCIPLE IN ALL JURISDICTIONS THAT REAL PROPERTY IS NOT SUBJECT TO CONVERSION, THE MONTANA SUPREME COURT AGAIN IGNORED THE "PLAIN RIGHTS" OF THE APPELLANT AND DEPRIVED APPELLANT OF ITS PROPERTY WITHOUT SOME REAL OPPORTUNITY TO PROTECT IT.

Stensvad's initial complaint sought damages for conversion of real property. As stated in the second amended complaint:

II.

> That the Plaintiffs, and each of them, were the owners of certain fixed assets and certain property upon which mortgages were paid until the events as herein detailed occurred, and each business was being maintained and operated by each Plaintiff with adequate security for obligations incurred and each of the Plaintiffs had the right to the possession of all assets and business.

III.

> That the Defendant Bank has taken over such businesses, has taken over all chattels, and, without cause, converted them to its own use.
>
> IV.
>
> That as a direct and proximate cause of the actions of the Bank and unlawfully converting such property and businesses, the Plaintiffs have been damaged by the unlawful conversion [in certain fixed amounts]. Second Amended Complaint at 6.

The Trial Court held for Plaintiff Stensvad and so stated in its Findings of Fact and Conclusions of Law:

> "F. 12. The cost of construction of the improvements of the feedlots and elevators taken by the Bank from the Plaintiffs was $814,936.00. The Court finds that such sum is a fair and reasonable value for the property taken by the Bank from the Plaintiffs." Appendix herein, infra, page 73.

In affirming the lower Court's decision but reducing the amount of damages from $814,936 to $411,935, the Montana Supreme Court clearly refers to the damages as "conversion of feedlot and elevators". See Opinion, Appendix, infra, page 130. Further, the Supreme Court clearly characterizes the award as an award in the nature of conversion when it states:

"We find the District Court should have used that figure [an appraisal figure] in a determination of the proper amount to be awarded to Plaintiff for his ouster from the feedlots and elevator." Id. at 129.

It is the rule in all jurisdictions which have considered the matter that an action for conversion lies only with respect to personal property, and that real estate is not subject to conversion. Eadus v. Hunter, 268 Mich. 233, 256 N.W. 323; Glencoe Land and Gravel Co. v. Hudson Bros. Co., 138 Mo. 439, 40 S.W. 93; Shelton v. Jones, 66 Okla. 83, 167 P. 458 (1917); Carpenters' Local Union v. Texas State Federation of Labor Bldg. Assoc., 288 S.W. 2d 874 (Tx. Civ. App.); Lun v. Mahaffey, 94 Or. 292, 185 P. 746; 18 AmJur 2d 169, Conversion §20.

Although this issue was raised by Petitioner Bank at every stage in the proceedings, including in the Petition for Rehearing, it was never even acknowledged as an issue, and damages were awarded for conversion of the real estate in spite of the clear rule

of law to the contrary. If the Court determined the Petitioner Bank should not have taken over the possession of the real estate, it should simply have returned the real estate to Stensvad - because Stensvad filed a Lis Pendens on all of the real estate, the Bank was unable to sell it to third parties anyway.

It is clearly impossible in the rational administration of justice to ignore a principle of law that is uniformly recognized throughout the country and nowhere denied, even in the state of Montana. See Chicago Life Insurance Co. v. Cherry, supra, 61 L. Ed. at 969. As stated by This Court in Roberts v. New York, supra, 79 L. Ed. at 1435, due process is lacking where "plain rights" have been ignored. The error certainly is so gross and obvious as to come close to the boundary of arbitrary action. Ibid. By the mere fact that the Supreme Court of Montana as well as the Trial Court failed to deal with this issue in spite of

the fact that all law on the subject supports Petitioner, due process was denied. Petitioner was denied an opportunity to protect its property. Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra, 74 L. Ed. 2d at 1114. An opportunity to be heard in a court of law is meaningless when entitlement to property is clearly outlined and supported by law which is universally accepted with no exceptions and that property is nevertheless taken without comment on this rule of law. Petitioner, therefore, has been effectively denied an opportunity to protect its property. Brinkerhoff, supra.

(3) BY RULING THAT RESPONDENT STENSVAD WAS ENTITLED TO DAMAGES FOR VALUE OF CERTAIN REAL AND PERSONAL PROPERTY CONTRARY TO PREVIOUS RULINGS OF THE SAME TRIAL COURT INVOLVING THE SAME PARTIES AND THE SAME PROPERTY WHEN THE DOCTRINE OF RES JUDICATA WAS PROMINENTLY AND PROPERLY RAISED CONSTITUTES A DENIAL OF

PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW.

When the Bank foreclosed on the collateral securing its promissory notes, it used legal means to do so. All real estate was foreclosed under proper judicial proceedings in a separate lawsuit including the issue of a judgment and decree of foreclosure by the exact same trial court that heard the instant case. See Judgment and Decree of Foreclosure in Cause No. 7072, Appendix, infra, page 1 . Although not required to do so under the Uniform Commercial Code, the Bank used legal proceedings to foreclose and sell all personal property also. See Order Approving Sale and Judgment in Cause No. 7054, Appendix, infra, page 14. The Order shows on its face that opposing counsel (for Stensvad) appeared. Id. at 14 . The judgments in these separate lawsuits rendered a monetary judgment in favor of Petitioner on the promissory notes after application of

proceeds from sale and after reduction kby costs of sale and other appropriate costs but increased for amount of interest. The judgments were not appealed.

Despite continual insistence by Petitioner that any offset should use the judgment amounts from these separate lawsuits as the starting point, the Trial Court, and later the Supreme Court, picked an arbitrary date (November 11, 1971) and applied all sale proceeds and interest calculations from that date in determining the amount awarded Petitioner on its promissory notes.

> 27. For convenience in analyzing the evidence, the Court adopts November 11, 1971 as an accounting date for the setoff because the Bank commenced a compilation of adequate accounting records on that date. As of November 11, 1971, the Plaintiffs were indebted to the Bank for all borrowings in the amount of $1,022,325.71. Findings & Conclusions, March 24, 1980, Appendix, infra, page 77.

The original Supreme Court opinion adopted the same date without comment. Opinion, Appendix, infra, page 101.

Although the doctrine of res judicata

is well-known in every jurisdiction and was prominently and properly raised at every point of this lawsuit by Petitioner, neither the Trial Court nor the Supreme Court ever referred to this doctrine nor attempted to explain why it should not apply. The rule is well-summarized by the editors of AmJur 2nd:

> "As stated in many cases, the doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." 46 AmJur 2d 558-59, Judgments §394. Accord 1B Moore, Fed. Prac. ¶0.405.

This doctrine is well-recognized in Montana. Section 26-3-201, M.C.A.; S-W Co. v. John Wight, Inc., 587 P.2d 348 (Mont. 1978); Smith v. Musselshell County, 155 Mont. 376, 378, 472 P.2d, 878, 880 (1970); Brannon v. Lewis & Clark County, 387 P.2d 706 (Mont. 1963). These cases all indicate criteria that must be met in order for the principle of res

judicata to apply. Throughout, Petitioner has maintained that all criteria are met in the instant case and at no time has either the Trial Court or the Supreme Court ever suggested to the contrary. As previously stated, the judgments in the prior cases have not been appealed, and the time for appeal has expired. They have not been collaterally attacked in the instant case or in any other case. The criteria for the application of the principle of res judicata all apply. Yet, the principle of res judicata was not applied in the instant case. In this connection, this issue is very closely related to the interest issue inasmuch as the principal difference in the outcome by applying res judicata is the amount of interest between November 11, 1971 and the date of application of sale proceeds (essentially the date of judgment in the prior cases).

Again, as previously stated, it is impos-

sible in the rational administration of justice to ignore a principle of law that is so well-recognized and uniformly recognized throughout the United States and particularly in the state of Montana as the principle of res judicata. See Chicago Life Insurance Co. v. Cherry, supra, 61 L. Ed. at 969. As stated by This Court in Roberts v. New York, supra, 79 L. Ed. at 1435, due process is lacking where "plain rights" have been ignored. The error is certainly so gross and obvious as to come clos to the boundary of arbitrary action. Ibid. By the mere fact that the Supreme Court of Montana as well as the Trial Court failed to deal with this issue in spite of the fact that it was timely and properly raised by Petitioner Bank and in spite of the fact that the decision reached could not have been reached without considering this argument, Petitioner's property has been taken without a full opportunity to protect it. Brinkerhoff-Faris

Trust & Savings Co. v. Hill, supra, 74 L. Ed. 2d at 1114. An opportunity to be heard in a court of law is meaningless when entitlement to property is clearly outlined and supported by law which is universally accepted with no exceptions and that property is nevertheless taken without comment on this rule of law. Petitioner Bank, therefore, has been effectively denied an opportunity to protect its property. Brinkerhoff, supra.

B.

THE FEDERAL QUESTIONS WERE TIMELY RAISED.

Obviously, the federal question regarding the interest issue was not raised until the decision of the Montana Supreme Court denying Petitioner's Petition for Rehearing. Up until that time, all parties, including Respondent Stensvad, had all operated under the impression that the amount of interest was fixed by stipulation at $35,963.00. Only when the Supreme Court unexpectedly and without warning suggested that they could

not determine the amount of the interest (even though it had been stipulated to by the parties) was the issue raised. In denying Petitioner's Petition for Rehearing, the Montana Supreme Court states:

> "1. Petitioner Bank contended it is entitled to a setoff for interest accrued on the principal indebtedness on the notes from the date of breach until the moneys received on foreclosures by the Bank were applied on the notes. We so indicated in our Opinion. However, we carefully searched the record to determine the applicable amounts and dates, and were unable to identify either in any case. This Court is bound by the record before us. Therefore, we held that the setoff would be the amount of principal indebtedness as of the date of the breach on facts found by the District Court. See Appendix, infra, pages 187-188.

As previously indicated, had the Montana Supreme Court simply found the stipulation entered in the record by opposing counsel, it could not have stated that their search of the record was fruitless. The issue of denial of due process by failure to recognize this stipulation or, in the alternative, the failure to give Petitioner an opportunity

to be heard to establish the validity of the facts contained in the stipulation was not an issue until the Supreme Court made its astounding statement. Therefore, the issue was timely raised.

As stated by This Court in Saunders v. Shaw, 244 U.S. 317, 61 L. Ed. 1163, 37 S. Ct. 638 (1917) (Holmes, J.):

> "... when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the Plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The Defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation."
> 61 L. Ed. at 1165-66.

Accord Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra, 74 L. Ed. at 1112; Herndon v. Georgia, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794; Mo. ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 74 L. Ed. 870, 50

S. Ct. 326 (1930); Great Northern R.R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 77 L. Ed. 360, 367-68, 53 S. Ct. 145 (1932).

Thus, there is a well-recognized exception to the general rule that a constitutional question is urged too late if put forward on a Petition for Rehearing.

> The rule, generally as it is, does not extend to cases ... where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. Great Northern R.R. Co. v. Sunburst Oil & Ref. Co., supra, 77 L. Ed. at 367-68.

Since the federal issue was raised at Petitioner's first opportunity, it was timely raised.

The application of this first opportunity rule is certainly appropriate to the interest portion of the federal question raised in this petition. Obviously, it could not have been anticipated or raised at an earlier point than it was. Also, since the res judicata issue is so intricately a part of the interest issue, it is difficult, if not im-

possible, to say that it too could have been anticipated. Who would have thought that the State Supreme Court would ignore such a prominent and well-recognized principle as this. The failure of the Montana Supreme Court to recognize and deal with the issue and yet still rule against Petitioner on this issue could certainly not have been anticipated. Finally, the conversion of real estate issue similarly could not have been anticipated. The decision of the Montana Supreme Court in failing to deal with this latter issue and yet ruling against Petitioner on this point simply could not have been anticipated. In any event, both of these latter two issues, namely, the res judicata issue and the conversion of real estate issue, were properly raised as a federal issue (denial of due process under the 5th and 14th Amendments) during the rehearing process. And, as previously stated, they are intricately related to the interest

issue which did not arise until after the Court's denial of the Petition for Rehearing.

C.

THERE EXISTS SUFFICIENT SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT, WHICH ARE REAL AND SUBSTANTIAL FEDERAL QUESTIONS.

To sustain review, "special and important reasons" must be present. S. Ct. Rule 17. These reasons must not be "academic" or "abstract". Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 99 L. Ed. 897, 75 S. Ct. 614. The settlement of the principles involved must be important to the public. Rice, supra. The federal question must be real, Equitable Life Assur. Soc. v. Brown, 187 U.S. 308, 47 L. Ed. 190, 23 S. Ct. 123, and substantial. Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390, 96 L. Ed. 1022, 72 S. Ct. 842.

The kinds of considerations listed in Court Rule 17 are "neither controlling nor

fully measuring" of this court's discretion, Rule 17.1, and are illustrative but not exhaustive. Rice, supra.

One factor that can be considered in determining whether special or important reasons are present is the amount of money that is at stake, even though that factor is not sufficient in itself. United States v. Constantine (1935) 296 U.S. 287, 80 L. Ed. 233, 56 S. Ct. 223 (a question is an important one under predecessor to Rule 17, where, among other considerations, a large amount of money is involved. $1,000 special excise tax was involved in that case).

There can be no question that the amount of money involved here is large. If Petitioner is successful or unsuccessful, the stake involved is as follows:

-- interest question	$ 35,963
-- conversion of realty question	411,935
-- additional amounts under res judicata question	631,213
Total	$1,079,111

The matter has an obvious substantial impact on the Petitioner, a bank, its stockholders, and the people in the community if Respondent were to execute on a judgment against the Bank and its deposits.

More importantly, of course, is the importance of the legal issue. When errors of this magnitude creep into the law, it affects the entire administration of justice. It is clearly impossible in the rational administration of justice to ignore the principle of res judicata, the principle that real estate is not subject to conversion, and to ignore stipulated facts in the record (or, to allow the opposing party to repudiate a stipulation after the denial of a Petition for Rehearing in the state's highest court - which has the same effect). To effectively deny Petitioner an opportunity to be heard on these matters will signal to state courts throughout the land that they need not be concerned about appeals or petitions for

certiorari to the United States Supreme Court unless a direct interpretation of a federal statute or federal constitutional provision is involved. It is respectfully submitted that the rational administration of justice in this country requires that this issue be addresses in order to prevent a reoccurrence of this kind of gross error in violation of the "plain rights" of the parties.

D.

THE MONTANA SUPREME COURT DECISION DOES NOT PROVIDE AN ADEQUATE OR SUBSTANTIAL INDEPENDENT GROUND FOR ITS DECISION.

It is submitted that the decision of the Montana Supreme Court was so insubstantial and insufficient as to constitute a denial of due process in the taking of the Bank's property via the judgment. With reference to each of the three issues, it is argued as follows:

(1) Allowable Interest.

As noted, the Court of original

jurisdiction awarded Petitioner interest; the Montana Supreme Court agreed that interest was due from the time of the claimed breach of an agreement to finance until the application of foreclosure moneys to the balance due.

The stipulation of counsel for both sides in evidence in the case is that that amount was $35,962.93.

Neither the Respondent nor the Court at any point prior to judgment suggested, argued or pleaded, or even appeared on the question of the amount being in controversy. As offered by Respondent's counsel, the stipulation agreed to was as follows:

> "Let the record further reflect that had interest been accrued in these obligations, the interest to June 10, 1972, would be $35,962.93 accrued interest."
>
> Jan. 22, 1979, Supplemental Hearing Before the Court of Original Jurisdiction.

There is no basis in the record for concluding otherwise, and the decision of the Montana Supreme Court denying interest to Petitioner cannot be supported on any other

grounds.

(2) Conversion of Real Estate.

As noted, the Montana Supreme Court affirmed damages in the amount of $411,935 without acknowledgment of Petitioner's argument that realty is not subject to conversion nor are damages therefore available. The Court simply fully avoided the issue. The Court could not have reached the same conclusion by invoking any other principle of law. Further, as previously shown, its decision was clearly not based on any other principle. Acknowledging the issue would mean a return of the real property to Stensvad, and this was not done.

(3) Res Judicata.

The Supreme Court of Montana similarly avoided the issue of res judicata and affirmed an award of $631,213 (over and above the conversion of real estate amount of $411,935). While Petitioner did receive credit for $1,022,325.00, that figure would

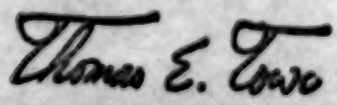
certainly have been much different had the principle of res judicata been applied and the offset commenced computation from the judgment amounts of the previous cases.

Again, there is no way the Montana Supreme Court could have reached the decision they reached in the amounts they awarded to Petitioner as an offset on some independant grounds. There is absolutely no way they could have arrived at the above figures without ignoring res judicata, and thus, the decision does not provide an adequate or substantial independent grounds for its decision.

9. CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



THOMAS E. TOWE
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CERTIFICATE OF SERVICE

I, THOMAS E. TOWE, attorney for Miners & Merchants Bank, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on May 26, 1982, I served three (3) copies of the foregoing Petition for a Writ of Certiorari on the Respondent herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to Ken Tolliver, Esq., Attorney of record for Respondent, at Post Office Box 1977, Billings, Montana, 59103.

Thomas E. Towe

THOMAS E. TOWE, ESQ.
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